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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Docket No. 96-98

Dear Mr. Caton:

Enclosed for filing are the original and sixteen (16) copies of the Comments of Ohio Edison Company on the Commission's April 19, 1996 Notice of Proposed Rulemaking. These comments specifically address Access to Rights-of-Way.

If you have any questions concerning this filing, please call me at the number below.

Sincerely,

Linda R. Evers

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Attorney
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Enclosures (17)

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Matter of	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

COMMENTS OF OHIO EDISON COMPANY

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COMMENTS OF OHIO EDISON COMPANY

Ohio Edison Company ("Ohio Edison"), appreciates the opportunity to provide comments to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking (the "NOPR") in the above-captioned docket released April 19, 1996. This NOPR is intended to implement the local exchange telephone company ("LEC") interconnection requirements of Section 251 of the Communications Act of 1934, (as amended by Section 101 of the Telecommunications Act of 1996 (the "1996 Act")).

Section 251(b)(4) imposes upon a LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." A small portion of the NOPR (¶¶ 220-225) relates to implementation of Section 224 as it relates to access to rights-of-way. It appears this section may be applicable to electric utilities as well as LECs. Ohio Edison's comments are directed towards and limited to the Commission's inquiries regarding pole attachments

and other access issues raised in the NOPR ¶¶ 220-225, as those rules would apply to electric utility companies. We hope they are of some assistance to the Commission in formulating its final rules.

Communication with respect to these comments should be addressed to:

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INTRODUCTION

Ohio Edison Company is an electric utility company headquartered in Akron, Ohio, and its subsidiary Pennsylvania Power Company, is based in New Castle, Pennsylvania. Ohio Edison Company and Pennsylvania Power Company (hereinafter referred to as "Ohio Edison") are dispatched as a single utility system. Ohio Edison provides electric service to more than one million customers within 9,000 square miles of central and northeastern Ohio and western Pennsylvania. Ohio Edison owns many thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure through which it provides electric service. Ohio Edison accordingly has a vital interest in the outcome of this proceeding.

The Commission indicated that it would address only the issues raised under Section 224(f) and Section 224(h) in the context of the interconnection requirements of Section 251(b)(4). NOPR ¶ 221. The Commission requested comments on specific questions relating to three broad issues: (1) "nondiscriminatory access[,]" which will be addressed in Part I below; (2) denial of access for want of capacity or "for reasons of safety, reliability, and generally applicable engineering purposes[,]" which will be addressed in Part II below; and (3) issues relating to modification of a pole, duct, conduit, or right-of-way, which will be addressed in Part III below.

SUMMARY

For the reasons fully described below, the Commission should:

- Adopt rules related to procedure and adjudicate on a case-by-case basis.
- Recognize the importance of reliable electric service and not limit electric utility pole owner's access to its own facilities.
- Defer to state and local zoning ordinances.
- Allocate capacity on a first come first serve basis.

Communications Act of 1934, as amended § 224(f)(1).

Communications Act of 1934, as amended § 224(f)(2).

See Communications Act of 1934, as amended § 224(h).

- Allow facility owners to reserve capacity for its future needs.
- Defer to the judgment of the electric utilities and grant them wide latitude to determine what constitutes valid safety, reliability and generally applicable engineering standards for purposes of denying access.
- Require all cable television and telecommunication companies to assume full risk and liability when making attachments to electric utility poles.
- Understand the importance of maintenance and reliability to the electric utility and adopt flexible notice requirements when it comes to modifications.
- Recognize the importance of database integrity by requiring carriers to inform pole owners prior to making any attachments.

I. COMMENTS RELATED TO NONDISCRIMINATORY ACCESS

A. The Commission Should Adjudicate Pole Attachment Access Disputes

In the NOPR, the Commission seeks comments regarding the meaning of "nondiscriminatory access" as that term is used in

Section 224(f)[4] of the Communications Act of 1934, as amended by Section 703 of the Telecommunications Act of 1996.[5]

Since the enactment of Title II of the Communications Act in 1934, the Commission has had numerous occasions to determine the meaning of the term "nondiscriminatory" in the context of its common carrier jurisdiction.[6] This well-developed body of law, as well as the similar bodies of law developed by agencies such as the Interstate Commerce Commission and the Federal Energy Regulatory Commission with respect to interstate railroads, motor carriers,

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[4] Section 224(f) provides:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

[5] Specific questions include: "[T]o what extent must a LEC provide access to poles, ducts, conduits, and rights-of-way on similar terms to all requesting telecommunications carriers? Must those terms be the same as the carrier applies to itself or an affiliate for similar uses? Are there any legitimate bases for distinguishing conditions of access?" NOPR ¶ 222.

[6] In re Warrensburg Cable, Inc., 48 F.C.C.2d 893, 896 (Rev. Bd. 1974) (holding a LEC unreasonably discriminated against a CATV system in denying access to its poles)

and pipelines, is readily and appropriately applied in the context of pole attachments. The Commission need make only the necessary adjustments with respect to the factual distinctions. Under the circumstances, the Commission should exercise its discretion under Chenery II[7] and to decline to issue a comprehensive set of rules with regard to the meaning of the term "nondiscriminatory access" in Section 224(f) at this time. Rather, the Commission should for the present resolve any disputes by adjudication.

The Supreme Court in Chenery II held that an agency may exercise its "informed discretion" to proceed by adjudication rather than by rulemaking where it does not have sufficient experience with a particular problem. This Commission has very little experience with the electric utility industry and cannot be expected to be aware of the vital factors affecting this industry.

In fact, the Commission used its common carrier jurisdiction to require access to LEC poles long before Section 224 was enacted. See In re Warrensburg Cable, 48 F.C.C.2d 893, 896 (Rev. Bd. 1974).

Securities and Exchange Commission v. Chenery, 332 U.S. 194 (1947) ("Chenery II"). Chenery II holds that in the absence of a statutory mandate, the choice between rulemaking and adjudication lies solely in an agency's informed discretion. Id. at 203. Section 224(e)(1) requires that the Commission adopt regulations only to "govern the charges for pole attachments used by telecommunications carriers[.]" Neither Section 224 nor Section 251 requires the Commission to adopt regulations specifically governing the mandatory access provisions of Section 224(f)(1).

Id.

The Commission's staff has impressive technical expertise with respect to the design, engineering, and use of RF devices, computers, and wired telecommunications networks. However, the staff does not possess similar expertise with respect to the engineering of high voltage electric transmission and distribution networks and to do so within the six-month statutory deadline for adopting rules implementing Section 251 will be difficult if not impossible.

Proceeding initially by adjudication rather than rulemaking is particularly appropriate with respect to pole attachment access issues for several reasons. First, using adjudication will not result in additional administrative workload. Second, the Commission cannot foresee the myriad of factual circumstances in which its rule would apply. There are tens of millions of distribution poles in use throughout the United States. They are located in cities; in rural areas; in areas in which the critical structural factors may be ice load, wind load, or violent storms; in near rain-forest conditions and in desert conditions; in soil types ranging from swampland to clay to rocks. Distribution poles support an incredible variety of power distribution equipment. Ohio Edison itself, which has a relatively compact service territory in comparison to some utilities, has over 550,000 poles presently in service. Within our service area, conditions affecting reliability and accessibility vary greatly ranging from

hilly terrains to regions prone to heavy storms. Every mandatory access complaint the Commission adjudicates will involve unique factual circumstances which the Commission cannot possibly, much less reasonably, foresee. Intangibles such as aesthetics must be considered. If citizens become fearful of being covered in a maze of electrical and communication lines, obtaining future easements will become difficult. This would force electric utilities to appropriate, when it typically would have been able to reach an agreement with the landowner. Moreover, ducts, conduits, and rights-of-way present different technical considerations than distribution poles. For example, access to conduits and ducts could cause OSHA problems. Most communication workers are untrained for high voltage work. In this regard, the Supreme Court has recognized that an agency's inability to foresee problems is a valid reason for an agency to proceed by adjudication rather than by rulemaking.[10] We urge the Commission to follow that authority in this regard.

B. Encumbering Access of Owners To Their Own Facilities Is Contrary to the Public Interest

The Commission requested comment as to whether the <u>owner</u> (i.e., the electric utility itself) of the pole should be precluded from attaching its own equipment except under the identical (or

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[10] <u>Chenery II</u>, 332 U.S. at 203.

similar) terms as those offered to telecommunications carriers.[11] A rule limiting the right of a public utility to make utility attachments to its own poles would be premature and it would infringe on the property interests of the facility owner. Furthermore, such a rule could interfere with the utility's obligation to provide electric service to the public. In the event that as electric utility is engaged in the same type of telecommunication equipment, should it then be required to follow the same terms and conditions solely for the telecommunications equipment and not equipment integral to providing electric service.

The reasons underlying common terms and conditions demonstrate that they are unnecessary with respect to the electric utility itself. For instance, terms and conditions that might be applied to a telecommunications carrier may involve identification of the telecommunications equipment to be attached to a pole. This may include an analysis of equipment with which the electric utility engineers are unfamiliar, and time must be provided to permit that analysis to be accurately completed. On the other hand, the types and amounts of structural loads of electric utility material is well known to electric utility engineers, with the pole itself having been selected in order to support the electric utility

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[11] "Must those terms [for access to poles, ducts, conduits, and rights-of-way] be the same as the carrier applies to itself or an affiliate for similar uses?" NOPR ¶ 222 (emphasis added).

equipment. Other terms and conditions might be applied to telecommunications carriers to enable the electric utility to ascertain that sufficient usable space is available on particular poles for a desired telecommunications attachment. This analysis would not be needed for the attachments of the electric utility itself because the National Electrical Safety Code reserves the top several feet above the neutral zone for electrical attachments.

With respect to telecommunications carriers, the electric utility must know attachment information well before the desired effective date in order to coordinate these attachments. Usable space in the telecommunications section of distribution poles may be at a premium, particularly as additional telecommunications carriers begin competing with incumbent LECs and cable televisions systems. Moreover, the electric utility must require the telecommunications carrier to provide specific information regarding the location, equipment types, and so forth regarding each attachment in order to maintain an accurate database of attachments.[11] Database integrity is a serious problem facing all pole owners because cable television operators have frequently made attachments without even informing the utility.

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[11] Under Section 224(h) as amended by the 1996 Act, the accuracy of this database is very important. New Section 224(h) requires facilities owners to provide written notice of intended facilities modifications to all attaching entities.

As the above discussion demonstrates, different needs and concerns regarding telecommunications attachments will require some legitimate procedural terms and conditions that are unnecessary with respect to the electric utility pole owner. The Commission should recognize this and not adopt regulations limiting the ability of pole owners to make attachments to their own poles.

II. COMMENTS RELATING TO CAPACITY CONSTRAINTS AND DENIAL OF ACCESS FOR SAFETY, RELIABILITY AND GENERALLY APPLICABLE ENGINEERING

A. The Commission Should Consider State Regulations in Mandating Access to Poles, Ducts, Conduits, and Rights-of-Way

The Commission specifically requested comment regarding whether there are "any legitimate bases for distinguishing conditions of access." NOPR ¶ 222.

Conditions of access should be distinguished on the basis of state regulations and local zoning ordinances. Electric utilities are subject to state and local regulation wholly apart from the pole attachment provisions in Section 224. Such regulations (particularly health and safety regulations) are not preempted by Section 224. Moreover, state agencies may have adopted specific structural design guidelines which may be in excess of otherwise applicable engineering codes. Such state regulations would clearly be at odds with a rule, if the Commission were to adopt one, that arbitrarily mandates absolute access by all telecommunications carriers to distribution poles and could potentially expose an

electric utility to state liability for compliance with the FCC regulations, and vice-versa.

Also, certain attachments could violate applicable local zoning restrictions. The Commission's access rules clearly should state that they do not preempt local zoning ordinances and that access is subject to compliance with local zoning ordinances. Moreover, the Commission should require that if zoning action is necessary, the entity requesting attachments, and not the owner of the pole, is required to submit and prosecute in its own name any required zoning applications, building permit applications, and other applications to local authorities. Further, the Commission should require the carrier to coordinate such applications with the owner of the pole prior to submission. The Commission should also require that the entity desiring attachments, and not the owner of the pole, must pay all zoning or other application fees, counsel fees, and all other costs associated with such applications including the full reimbursement for costs, wages, benefits and out-of-pocket expenses of the electric utility's employees for actual time spent on zoning activities on the carriers' behalf. The Commission should recognize that our core business is to provide reliable electric service and not pole attachment rentals. Therefore, our ratepayers and shareholders should not be encumbered with the burden of subsidizing pole attachments for the prosperity of the telecommunications industry.

B. The Commission Must Preserve Third-Party Property Rights In Its Nondiscriminatory Mandatory Access Rule

A further basis for distinguishing terms of access lies in third-party property rights. A large proportion of the rights-of-way used by electric utilities is not owned in fee but is used pursuant to an easement or other paid license granted by the fee owner of the underlying real estate. Easements granted in recent years might be broad enough to permit the pole owner to make any attachments sought by telecommunications carriers. However, earlier easements were typically drafted to permit only the running of electrical wires, or perhaps, electrical and telephone wires. Such restrictive easements would not permit the attachment of radio antennae for wireless carriers, and may not encompass the attachment of various telecommunications equipment which other carriers might require, particularly as technology develops in the future.

The Commission could reasonably require that the owner of the facilities upon which an attachment is sought to negotiate in good faith with the fee owner of the land for the purpose of obtaining an appropriate easement. If the Commission requires such negotiations, it should protect the interests of the facilities owner by (i) requiring the entity requesting an attachment to reimburse the facilities owner for all additional easement fees and for transaction costs including the full cost of wages and benefits

of utility employees and out-of-pocket expenses related to the actual time spent arranging such easements,[11] and (ii) allowing the owner of the facilities to retain control of the easement negotiation. Attempted negotiation of easements by multiple entities all relating to the same physical facility (pole, duct, etc.) could confuse property owners, and, if successful, would result in a confusing property rights situation. The utility should be required to begin such negotiations within a reasonable time (e.g., thirty days) after an attachment request and should be required to negotiate in good faith, keeping the entity requesting such attachments informed. However, the final rule must also recognize that some easement negotiations are doomed to fail for a variety of reasons not under the facilities owner's control.

Finally, the Commission should not order a utility to exercise the power of eminent domain to condemn property (in easement or in fee) solely for the purpose providing attachments. A utility's exercise of eminent domain involves significant time and expense, and is invariably accompanied by adverse publicity, complaints to state commissions, and voter pressure on local elected officials. Unless no other alternative exists, most utilities are therefore very reluctant to condemn private property, even for their own

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[11] In fairness to the entity requesting an attachment, other entities taking advantage of additional easements could be required partially to reimburse the first attaching entity for such costs.

electric business. Also, state law in most instances limits a utility's power of eminent domain to instances in which property is required to provide electrical service[4] (and not for the purpose of enabling a third party to provide telecommunications services). For these reasons, the Commission should not require electric utilities to attempt to condemn property if landowners will not agree to additional easements.

C. "Capacity" Should Be Determined On An Engineering Basis, With The Facility Owner Being Permitted To Reserve Reasonable Expansion Capacity

The Commission seeks comments on "specific standards under section 224(f)(2) for determining when a utility has 'insufficient capacity' to permit access."[5]

The maximum number of possible attachments should generally be determined on an engineering basis by reference to applicable engineering codes. For instance, the number of permissible attachments on a pole of a given height can readily be determined by reference to the National Electrical Safety Code. The capacity of ducts, conduits, and rights-of-way may similarly be calculated.

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[4] See, e.g., Ohio Rev. Code Ann. § 4933.15, Fla. Stat. Ann. § 361.01 (West 1968); Ga. Code Ann. § 22-3-20 (Michie 1982); N.H. Rev. Stat. Ann. § 371:1 (1995 Repl. Vol); N.M. Stat. Ann. § 62-1-4 (1993 Repl. Pamphlet); Va. Code Ann. § 56-49 (1995 Repl. Vol.) (all limiting utility exercise of the power of eminent domain to circumstances in which property is required for the purpose of providing electric service).

[5] NOPR ¶ 223.

A more significant question involves the extent to which an electric utility should be able to reserve capacity for its own use. In the first instance, the Commission should distinguish between the utility itself and its telecommunications affiliates. A utility's telecommunications affiliates should be treated the same as third-party telecommunications carriers. This equivalent, nondiscriminatory treatment should encompass the ability to reserve capacity, in addition to other terms and conditions.

The utility itself, however, must have greater rights. A utility's decision as to what size pole, conduit, duct, or right-of-way to construct or acquire is made by determining its present and future needs for its electric power business. Until the 1996 Act, the utility could be confident that the reserve capacity thus designed into its system would be secure, because the decision whether to rent attachment space at all was in the sole discretion of the utility.[1] The 1996 Act, however, changes this paradigm, mandating access to third parties. In the context of distribution poles, the threat to future utility needs may be minimal, because distribution poles must be at some minimal height (about 35 feet) for safety purposes, which in most cases will be sufficient to support several attachments. In the context of existing underground ducts and conduits, which are extremely expensive to

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[1] See Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 251 (1987).

install, the threat to future utility requirements may be acute unless the conduit or duct owner is permitted to reserve capacity.

The Commission must permit electric utilities to retain reasonable reserve capacity to support future needs, particularly in light of Section 224(i) (which precludes a utility from requiring attaching entities to pay for rearrangements of their attachments if the utility in the future must increase the capacity of its facilities for its own purposes). A rule mandating access with no permissible reserve could lead to the result that a utility may have prudently planned for future needs by building a reserve in its facilities, see that reserve eliminated by telecommunications attachments over which it has no control, and then be required under Section 224(i) to pay for rearrangement of those unwanted attachments when its forecast needs materialize.

Furthermore, the amount of such reserve should not be determined as an absolute limit (e.g., 30%), because the need for such reserve will vary depending upon the situation. In an area in which significant building is taking place (e.g., on the outskirts of a rapidly expanding metropolitan area), a larger reserve is appropriate than in an urban area that has already been developed. The Commission should therefore determine the allowable reserve on a case-by-case basis, giving significant deference to the utility's past planning practices.

D. Capacity Should Be Allocated On a First Come, First Served Basis, Allowing Reasonable Reserve Capacity For the Facility Owner

The Commission seeks comments on regulations directing capacity allocation schemes.[12]

However, absent stunning foresight, it will be difficult to draft a specific allocation rule that fairly addresses the needs of all concerned parties. Neither the electric utility nor the Commission can know whether a competing telecommunications carrier will spring up in the future with an attachment demand. Neither the electric utility nor the Commission can know whether an existing competing telecommunications carrier may in the future desire to extend its service into a new territory in which another carrier is making a present attachment demand. Given this uncertainty, the Commission should require electric utilities to allocate third-party attachment capacity on a first-come, first-served basis. In order to preclude a telecommunications carrier from impeding competition by leasing all attachment capacity, carriers holding leased capacity should be required actually to make an attachment within a reasonable period (e.g., six months) if the utility must deny a competitor's attachment request for want of capacity.

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[12] "May we, and should we, establish regulations to ensure that a utility fairly and reasonably allocates capacity?" NOPR ¶ 223.

E. Electric Utilities Should Have Wide Latitude To Determine What Constitutes Valid Safety, Reliability, or Generally-Applicable Engineering Purposes Under Section 224(f)(2)

The Commission seeks comments on several issues relating to the statutory exception in Section 224(f)(2) permitting an electric utility to deny access for reasons of safety, reliability, or generally applicable engineering purposes. In particular, the NOPR asks what "specific reasons . . . if any" could justify denial,[18] whether a "certain minimum or quantifiable threat to reliability" should be required,[19] and whether the Commission should "establish regulations that expressly impose on utilities the burden of proving that they are justified in denying access pursuant to section 224(f)(2)[.]"[20]

The Commission should not attempt to establish an all-inclusive list of "specific reasons" of safety, reliability, and generally applicable engineering purposes that would justify denial of access. There are a numerous factual circumstances in which attachments might be sought, and each may present different "specific reasons" that might justify denial of access. Electric utilities have been in the business of providing reliable power for over a hundred years, and are constantly learning new and better

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[18] NOPR ¶ 222.

[19] NOPR ¶ 223.

[20] Id.

ways to serve the public reliably. Reliability of the electric grid is not simple in concept or execution, but the product of many engineering factors. If one of those factors changes, other factors must be controlled to ensure reliability. As electrical distribution systems evolve, some current threats to reliability may be eliminated and more attachments could become possible. And with the advent of change in the electric utility industry, it is impossible to predict what engineering changes may be necessary in the future to continue to deliver reliable electric service. If the Commission were to establish a fixed list of reliability factors in this proceeding, that rule might frustrate to some extent this overriding industry imperative.

For this reason, the Commission should not attempt to legislate reliability standards by rule. Rather, a good compromise between the interests of the electric utility industry and the telecommunications industry would be to provide procedural safeguards rather than substantive engineering standards to ensure that a utility does not use reliability as an excuse to deny access. As perhaps contemplated in the NOPR, the utility may appropriately bear the burden of proof to establish that proposed attachments quantifiably threaten reliability. Ohio Edison is comfortable in bearing that burden because it has no intention of using reliability as an excuse to deny access and it is confident that its engineers can credibly demonstrate which proposed

attachments threaten reliability. However, once a utility demonstrates through an engineering analysis that proposed attachments quantifiably threaten reliability, that engineering analysis should be considered a rebuttable presumption. The Commission is reminded that Section 224(f)(2) contemplates a prospective analysis. Electric utilities are not and should not be required to allow its reliability to be impaired. A utility's prima facie case should be met by demonstrating a threat to reliability, the burden should shift to the telecommunications carrier seeking the attachments incomplete or invalid.

F. The Commission Should Require Compliance with the National Electrical Safety Code and Structural Integrity As Important Safety Criteria

Certain safety factors justify denial of access. The Commission should recognize that utilities and carriers universally recognize that a violation of the National Electrical Safety Code (the "Code") requirements pertaining to distribution pole attachments constitutes a specific reason of safety that would justify denial of access. In this regard, the Commission should require that not only must a proposed attachment meet the theoretical requirements of the Code, but that the telecommunications carrier in practice must comply with this Code. A denial of access would be justified would be if the proposed attachment would exceed the maximum load (in either compression or shear) that the structure can support. This should be measured